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IN THE

Supreme Court of the United States

October Term, 1953

No. 868

SCHERING CORPORATION, *Petitioner*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the case of Herbert Brownell, Jr., Attorney General v. Schering Corporation on January 17, 1956.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey, filed on March 21, 1955 (App. 195a),[1] is reported in 129 F. Supp. 879. The per curiam opinion of the United States Court of Appeals for the Third Circuit is printed as Appendix A hereto and is reported in 228 F.(2d) 624.

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[1] The Joint Appendix will be cited as App.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1) Whether a directive to execute an agreement, issued by the Attorney General under his "supervisory" power, to a domestic corporation, its directors and officers, is void for lack of jurisdictional findings responsive to the limitations imposed by the Executive Order which delegated authority to him.

2) Whether the Attorney General may direct an "enemy national" to give its property to private individuals.

3) Whether the Attorney General may take property by the exercise of the "supervisory" (i.e. regulatory) power, as distinguished from the "vesting" power, under the provisions of §5(b) of the Trading with the Enemy Act.

4) Whether said "supervisory" power is constitutionally invalid because said Act provides no remedy whereby relief may be sought by one injured by exercise of the power.

STATUTE INVOLVED

Section 5(b)(1) of the Trading with the Enemy Act (as amended by the First War Powers Act, 1941, 55 Stat. 839), 50 U.S.C. App. Sec. 5(b), provides in pertinent part that

> "During the time of war or during any other period of national emergency declared by the President, the

President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise

* * * *

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

"by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, * * *"

STATEMENT OF THE CASE

Petitioner is a New Jersey corporation engaged in the manufacture of pharmaceuticals. At the outbreak of World War II, its common stock and 42% of its preferred stock were owned by a German parent corporation. In 1942, the Alien Property Custodian vested the shares (App. 3a). Respondent succeeded him as shareholder, caused the Company to retire the preferred stock, and in March, 1952, sold the common stock at public sale for $29,131,960 (App. 3a). The sale was to investment bankers for resale to the public (App. 80a, 196a), and the shares were all purchased by American citizens (App. 87a).

Prior thereto, on January 5, 1952, and in contemplation of the sale (App. 3a; Respondent's brief in the court below, p. 37, fn. 43), respondent, purporting to act under

the Trading with the Enemy Act and as administrator of the vested stock, issued a Directive (App. 200a) addressed to petitioner and its board of directors, directing petitioner to execute the agreement in suit. Certain patents owned by petitioner were, by the agreement, transferred to the Attorney General, and certain others were required to be licensed by petitioner to any applicant (App. 3a-5a). It is stipulated that petitioner's officers and directors executed this agreement involuntarily, under compulsion and fear of imprisonment (App. 77a).

After the sale of the stock had been completed, a new board of directors declined to perform the agreement, believing it void for duress (App. 61a, 63a). Respondent thereupon brought suit to enforce the agreement, invoking 28 U.S.C. §§1345, 2201, 2202 and 50 U.S.C. App. §17 (App. 2a). Petitioner, in its answer, pleaded illegality and unenforceability by virtue of duress, and in its counterclaim sought to have the agreement set aside and its title to all of the patents confirmed. Respondent's motion to dismiss the counterclaim was granted by the district court, and a final order was entered requiring petitioner to perform the agreement. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I

The Directive Is Void for Lack of Jurisdictional Findings

The decision of the court below is in direct conflict with the decisions of this Court holding that administrative orders which lack jurisdictional findings are void. *Mahler* v. *Eby*, 264 U.S. 32. For respondent's Directive lacks such findings and therefore should have been held void. Executive Order No. 9193, whereby the President

delegated certain powers to the Alien Property Custodian, predecessor of the Attorney General, provides in par. 10(a) that

> "persons *not within* designated *enemy countries* • • • shall not be deemed to be nationals of a designated enemy country *unless* the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of [an enemy country or national]; • • • or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country." (App. 126a-127a). (Emphasis added throughout.)

Schering, a domestic corporation, was *not within* a designated enemy country; consequently findings responsive to the requirements of clauses (i) or (iii) were mandatory. No such findings are contained in the Directive. Limitations imposed by an Executive Order are jurisdictional. *Peters* v. *Hobby*, 349 U.S. 331, 345. When the President delegates his authority by Executive Order, an exercise of the power must be grounded on findings responsive to the limitations there imposed.

The district court[2] first excused the absence of findings on the ground that petitioner had "notice" of the underlying facts and "was in no way misled" (App. 229a-230a). The findings doctrine, however, is not predicated on notice but on "general principles of constitutional government", on the fact that there is an exercise of "delegated legislative power." *Mahler* v. *Eby*, 264 U.S. 32, 44. Without the findings requirement, an administrator would have "unfettered discretion as the qualification of authority would be ineffectual." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 431.

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[2] We refer throughout to the district court opinion because its conclusions and analysis were adopted by the court below.

Next, the district court relied on the mention of prior vesting orders in the Directive (App. 238a). But there was no *express* incorporation by reference of the *findings* contained in those vesting orders; the vesting orders were merely mentioned. *Wichita R. & Freight Co.* v. *Public Utilities Comm.*, 260 U.S. 48 had held, said the Court in *Mahler v. Eby, supra,* that where

> "a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act",

and that the relevant order

> "was void for lack of the express finding in the order."[3]

That each administrative order must be self-sufficient is attested by respondent's invariable practice with respect to Schering itself. Each of the five vesting orders which follow the first Schering vesting order (App. 233a, 131a-144a) contains completely independent jurisdictional findings. Respondent's scrupulous adherence to self-sufficient orders testifies that *each* administrative order must contain jurisdictional findings, and that this requirement is not administratively impracticable.

Consider the consequences of a different rule in the context, for example, of the Interstate Commerce Commission practice. Although the Commission had repeatedly found a motor carrier "fit, willing and able" to perform proposed services and although the carrier was notoriously successful, is it conceivable that the Commission would be allowed to dispense with a fresh finding to this effect when the carrier applied for still another route extension? 49 U.S.C. §307. Certainly it never has done

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[3] The Court has since
"repelled the suggestion that lack of express findings by an administrative agency may be supplied by implication." *Atchison, T. & S.F. Ry. Co.* v. *United States*, 295 U.S. 193, 202.

so; each new route authorization stands on its own bottom.

To rely, without incorporation by reference, on findings made in earlier orders, would foster disregard of jurisdictional limitations and breed chaos. Who could ascertain, upon reading an order in the Federal Register, whether it was legally sufficient or insufficient? Courts require self-sufficient counts though they are contained in one and the same pleading. On what theory is less to be required with respect to administrative orders that are scattered throughout the volumes of the Federal Register?

The requirement that every order be self-sufficient is especially important when the prior orders issued under an entirely different power. As the prior orders were all vesting orders, they issued under the "vesting" authority conferred by § 5(b) of the Act. The Directive, however, was purportedly issued under the "supervisory" authority. Respondent and his predecessors, however, have never relied on an exercise of the vesting power to confer supervisory (i.e. regulatory) jurisdiction,[4] under which the Directive issued. They have vested stock from shareholders by vesting order and have taken "supervision" of the corporation itself by *supervisory order*. See Vesting Order No. 168 and Supervisory Order No. 20, issued in the same case (App. 190a, 114a). Each such order contained independent jurisdictional findings.[5] Even

[4] For the jurisdictional difference between the vesting and supervisory powers see infra, 12-13.

[5] At a later date it became the "practice of the Office to incorporate the supervisory order in all vesting orders affecting enemy interests in business enterprises." 1st Ann. Rep't., Alien Property Custodian, March 11, 1942 to June 30, 1943, p. 19. For examples of such incorporation, which thereby gave a jurisdictional basis for the exercise of "supervision", see App. 144a, 148a, 151a, 153a, 158a, 161a. No such incorporation of a "supervisory order" is to be found in any Schering vesting order. Respondent's own documents show that no supervisory order ever issued. App. 88a, 84a, 93a, 96a. In a word, no proper basis was ever laid in

where he sought to supervise an individual whose property had been vested, respondent published an amendment, expressly incorporating the taking of "supervision" into his prior vesting order (App. 169a, 171a, 165a). By his own testimony, therefore, issuance of a vesting order does not absolve him from taking "supervision" expressly and making independent jurisdictional findings.[6] Had he properly taken "supervision" in any prior order there might possibly be a basis for arguing that fresh findings were unnecessary for each new exercise of the supervisory power, although that argument would collide with respondent's own practice to the contrary in this very case—he repeatedly made independent findings upon each fresh exercise of the vesting power.

In the courts below, it was argued that there was supervision in fact and hence there was no need for an order or findings. Acceptance of this argument would gut the whole findings requirement. It would make possible the very "unfettered discretion" that findings are designed to avoid. Who would pause to make findings which can be judicially reviewed if one can safely act without them.

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this case for the exercise of the supervisory power. And the Directive itself fell short of serving as a "supervisory order" because it lacked jurisdictional findings.

[6] The district court erroneously found that the Custodian had taken "supervision" by his Order No. 2 (App. 238a-239a). That Order mentioned the earlier Schering vesting orders and stated that the Custodian

> "has assumed supervision * * * pursuant thereto and by virtue of Gen. Order No. 31." (App. 87a)

Since the vesting orders nowhere refer to the taking of "supervision", he had not thereby "assumed supervision". General Order 31 (App. 172a) *prohibits*

> "All transactions by, or with * * * any business enterprise of which the Alien Property Custodian has *undertaken the supervision*, or which he has vested."

Thus the Order itself shows that it applies where the Custodian has already "undertaken supervision" of an enterprise; it was designed to "prohibit" transactions by "supervised" enterprises, not to "assume supervision" of them.

No, findings are the precondition of administrative action and without them administrative action is invalid.[7]

We submit that in insisting on findings "in the record of the act", in repelling the substitution for express findings of findings "by implication," supra, p. 6, this Court has required self-sufficient orders. This case represents the solitary deviation of respondent from that requirement and in condoning that departure the decision below is in conflict with the decisions of this Court.

Against this, respondent argued in the court below (Brief, p. 31) that petitioner could not insist that its "superior comply with 'administrative law' in issuing orders", citing *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127. It was there held that historically the administration of the government's "purchasing machinery [must] be unhampered" (310 U.S. at 130), that one who shows "no more than a mere possible injury to the public" (id. at 132) cannot complain of administrative interpretations, and that

> "The act does not represent an exercise by Congress of regulatory power over private business or employment." (id. at 128)

Hence it was held that would-be sellers of supplies to the government could show no "legal right" to review of an administrative interpretation of that Act. Here, however, a federal officer is seeking to enforce a contract procured under duress against a "private business", the object of which is to take property from it. Respondent himself stated in the court below (Brief, p. 37, fn. 43) that

> "when the contract is entered into with a corporation *with a view to a contemplated sale* of its stock,

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[7] "such determinations are prerequisites to the seizure whether the seizure *be actual* or symbolical" [i.e. by World War I "demand" or World War II "vesting order"]. *Hunter* v. *Central Union Trust Co.*, 17 F. (2d) 174, 178.

> the interests of the corporation may be measured after the sale by the interests of the third parties into whose hands the stock passes."

"Measured" by the interests of the Americans who bought the shares from respondent, the threatened deprivation immediately imperils their "legal rights." The American purchasers from respondent are therefore entitled to insist that a contract which was designed to affect them be made in compliance with law. To extend the area in which federal officers are free from judicial check beyond the "public contract" situation of the *Lukens* case is to invite arbitrary rule and lawlessness in an ever expanding federal domain.

We submit that each administrative exercise of delegated power must show on its face that it responds to the limitations imposed on the delegated authority and that respondent's Directive was void for lack of such jurisdictional findings.

II

Respondent Was Not Empowered to Direct an Enemy National to License Its Patents to Private Individuals

One portion of respondent's Directive ordered petitioner to license certain of its pharmaceutical patents to all applicants. In sustaining this order, the court below decided an important question of federal law which has not been, but should be, settled by this Court.

The object of the Trading with the Enemy Act was the seizure of enemy property by the government, not to enable the Custodian to compel enemies to make gifts of it to individual Americans. There is not the slightest intimation in the statute or its legislative history that the Custodian is authorized to order enemies to transfer their property to private persons. It is scarcely neces-

sary to dwell on the evils that could flow from recognition of such a power, the enrichment of spoilsmen, the diversion of enemy property from the government. And should Congress later conclude that enemy property should be returned, the gifts to private persons might well prove irreversible. To read into the statute an authority to compel enemies to transfer their property to private individuals is to subvert its basic purpose. And this in a situation where respondent confessedly had feasible alternatives. He conceded in the district court that he could have vested the patents,[8] whereupon he himself could have issued licenses. He likewise there conceded that he could have voted to liquidate the company and have the patents distributed to himself.[9] Or he could have elected directors who shared his views and required no coercion.[10] With these alternatives available to respondent and to future administrators, there is scarcely need to warp the law in such dangerous fashion.

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[8] Hearing Transcript, January 15, 1954, 2d folio, p. 199.

[9] Brief No. 3, p. 33 (filed by plaintiff-respondent) in the district court.

[10] We reserve the question whether respondent was authorized, as a shareholder of a New Jersey corporation, to constrain the board of directors. The district court erroneously held that he had such powers; the court below did "not disagree" but found it "unnecessary to adopt" that view (Appendix A, p. 24). In New Jersey, two directors holding all of the stock cannot control directorial discretion because that would render "void the authority of the legislature", which has confided management exclusively to the directors. *Jackson* v. *Hooper*, 76 N.J. Eq. 592, 75 Atl. 568, 573. This is the universal rule. The district court distinguished it by identifying corporation and shareholder, an identification made in New Jersey solely to prevent fraud as to third parties. *Frank* v. *Frank's Inc.*, 9 N.J. 218, 87 A. (2d) 724, 727. See also *White* v. *Evans*, 117 N.J. Eq. 1, 174 Atl. 731. Why, indeed, should equity relieve a shareholder from compliance with a statute which he disobeys in the presence of lawful alternatives? Cf. *Benintendi* v. *Kenton Hotel*, 294 N.Y. 112, 118, 60 N.E. (2d) 829.

III

Respondent Was Not Authorized to Take Property by Exercise of the Supervisory Power

Respondent's Directive also ordered petitioner to transfer certain of its patents to him. Read literally, the Act does provide that respondent may compel a transfer. But a literal reading [11] makes meaningless a statutory scheme which sharply differentiated between vesting and supervision, and moreover would authorize confiscation of constitutionally-exempt American interests (*Henkels* v. *Sutherland*, 271 U.S. 298, 301), a result which Congress plainly sought to avoid.

The usurpation of powers by the chief law officer of the United States without more presents a question of transcendent importance. Its importance is heightened by the fact that a considerable body of foreign property remains "frozen" and that claims of Americans and "non-enemy" aliens to interests of one kind or another in such frozen property are without any remedy. Today, with war clouds ever over us, "freezing" controls may at any moment be extended and these powers once again exercised to the detriment of still other Americans. See *infra* p. 17.

We begin with the statutory differentiation between the "vesting" and "supervisory" powers, from which it will appear that respondent was without power to *take* property by a directive issued under the "supervisory" power because Congress limited the *taking of property* to the narrowly confined "vesting" power. The first clause of §5 (b)(1) deals with the so-called "freezing" and "su-

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[11] Because the 1941 amendment to §5(b) of the Act was hastily drafted immediately after Pearl Harbor, this Court emphasized that

> "the legislation was a makeshift patch work. Such legislation strongly counsels against literalness of application." *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319.

pervisory" powers. It provides in pertinent part that the President or his delegate may

> "investigate, *regulate, direct and compel,* nullify, void, prevent or prohibit, *any* acquisition, holding, withholding, use, *transfer,* • • • or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property *in which* any foreign country or a national thereof *has any interest,* by any person, or with respect to any property, subject to the jurisdiction of the United States;"

A further clause then confers the "vesting" power:

> "any property or *interest of* any foreign country or *national* thereof *shall vest,* when, as, and upon the terms, directed by the President, in such agency or person as may be designated • • • by the President • • •."

Thus §5(b) sharply distinguishes between the *vesting* power, which is confined to "property or *interest of* any foreign country or national", and the *regulatory* (i.e. *"supervisory" and "freezing"*) power, which extends to "any property *in which* [a foreign national] has any interest." Concretely, only the foreign "interest" in property intermixed with American interests may be vested; but the entire complex *"in which"* foreigners have an interest may be "frozen" or "supervised", if literal effect be given the statutory language. Having limited vesting of property to the *"interest of"* a foreign national, Congress scarcely intended to nullify the *limitation* by authorizing the Attorney General to "compel the transfer" to him of "any property *in which* any [foreign national] has any interest."

To disregard the limitation, moreover, is to authorize the seizure of property owned by Americans. Now the Congress was repeatedly assured in unmistakable terms that the 1941 amendment to §5(b) had no applicability what-

soever to American interests. See Appendix B hereto. Nevertheless, respondent unabashedly laid claim to power over Americans in the district court. Referring to the words "direct and compel" in the "supervisory" clause of §5(b) counsel for respondent contended that:

> "This power would permit * * * a direction to the Board of Directors of General Motors to transfer enormous plants, let us say, because—and because alone one stockholder owning one share of stock in General Motors was a foreign national, literally speaking, and I am putting that to show what I believe to be the literal meaning of those words." Hearing Transcript, Jan. 15, 1954, 2d folio, p. 31.

The astonishing sweep of this claim emphasizes the need for rejecting a literal reading which repudiates the repeated assurances to Congress that the 1941 amendment to §5(b) left American interests altogether untouched.

The fact that the phrase "compel any transfer" was not designed to accomplish a taking of title is confirmed by the unvarying administrative practice of respondent and his predecessors. Since 1942, when the Alien Property Custodian's Office was revived, the Federal Register shows that *all* of some 14,000 transfers of title and possession to the Custodian were accomplished by vesting orders, *never* by supervisory orders or directives. In the court below respondent challenged this assertion, saying that "in a sizeable number of cases the Custodian took over property by a 'turn-over directive'" (Brief, 19). But the standard "form" used for such directive (printed in Appendix C hereto) plainly discloses that it was only employed to direct a turn-over of property that had *first been vested by a vesting order.* Cf. *Zittman* v. *McGrath,* 341 U.S. 471. Indeed, respondent conceded in the district court that

> "the Attorney General does not seize or vest prop-

erty by means of directives • • •". Brief No. 5, p. 14.[13]

This undeviating practice for more than ten years constitutes an administrative recognition of the fact that the Custodian was not authorized to transfer title and possession to himself by an exercise of the *supervisory* power. In a similar case, this Court said that

> "for over 10 years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed." *Federal Power Comm.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513.[15]

During the argument before the court below, counsel for respondent confessed to being "bothered" by the fact that a *taking* by directive "has never been done before." (Transcript of Argument, p. 36).[14] What really "bothered" re-

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[13] He also distinguished between "a vesting order which confers possession of and possessory title in specific property" and "a supervisory order which confers the power of regulation of an enterprise . . .". Brief No. 3 in the district court, p. 26.

[15] "But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351-352.

[14] He professed to find an "answer" in the "fact" that Vesting Order 18,685 had already vested the "right, title and interest" of German Schering in the patents, id. at 37, and that the Directive merely ordered the turn-over of already-vested property. But a "turn-over directive" always expressly refers to the prior vesting order (see Appendix C hereto) whereas the present Directive makes no mention of V.O. 18,685. Moreover, respondent stated in the district court that he *could* have vested the patents (Hearing Transcript, Jan. 15, 1954, 2d folio, p. 199), thereby conceding that he had not. Had V.O. 18,685 in fact vested the patents as German property, the entire elaborate argument in both courts below on the scope of "compel a transfer" would have been superfluous, because petitioner has never questioned that the patents which

spondent's counsel was the lack of power confessed by respondent's unvarying administrative practice, which responded to the statutory differentiation between vesting and "supervision". It should have "bothered" the court below.

When the taking of title is read out of the words "compel any transfer", respondent is not deprived of a necessary power. Title to enemy property can still be, as indeed it always has been, taken by vesting order. If "compel any transfer" goes beyond this, it is a dangerous joker which would permit respondent, as he claimed in the district court, to seize General Motors' plants. This claimed power constitutes an omnipresent threat which this Court should remove.

We submit that the power to take title by "directive" was denied by virtue of the statutory limitation of vesting to enemy property, a limitation that is confirmed by respondent's invariable practice of confining the taking of title to vesting orders.[15]

IV

The Supervisory Clause Is Unconstitutional Because It Furnishes No Remedy Against a Supervisory Order

The "supervisory" power is unconstitutional because no remedy whatsoever is provided to review its exercise.

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respondent sought to take by Directive could have been vested, and that a "turn-over directive" may issue with respect to *vested* property. The fact is, as the court below was immediately informed, German Schering had no interest whatsoever in the petitioner's patents and V.O. 18,685 was merely a final precautionary measure to cut off any possible, even if remote, claim of German Schering to the patents of its former subsidiary. Transcript of Argument, p. 50. For V.O. 18,685 see App. 136a.

[15] This is, of course, not a mere matter of labels attached to orders, but of identification of a power which, in the case of the "supervisory" power, cannot be and never was used for the taking of title.

In holding to the contrary, the court below decided an important question of federal law which has not been, but should be, settled by this Court. The general importance of the question may be gleaned from Treasury Department statements:

> "many of our own citizens have been declared to be nationals of blocked countries. • • • The property of such blocked nationals may not be dealt in except pursuant to license" [i.e. a "blocked" American cannot draw on his bank account to buy groceries without permission];
>
> • • • •
>
> "Innumerable instances may be noted where United States citizens were blocked or ordered removed from places of control in various enterprises;"
>
> • • • •
>
> "a number of law offices have been blocked and subjected to supervision".[16]

Assuredly the absence of a remedy to review such acts presents a question of large public importance, particularly since the "freezing" control continues in effect with respect to a large body of foreign property and claims of Americans with respect to such property are remediless. Respondent recently established that there can be no judicial review of a "freezing" order, i.e., no judicial compulsion to "unblock" assets, because the United States has not consented to suit and because "unblocking" requires "official" action so that an "individual" suit will not lie. *Codray* v. *Brownell*, 207 F. (2d) 610.[17]

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[16] *Administration of the Wartime Financial and Property Controls of the United States Govt.*, U.S. Treas. Rept. Foreign Funds Control (Dec. 1942) pp. 28, 33.

[17] Earlier attempts to obtain judicial relief from "blocking" of American bank accounts ran into a thicket of technical objections. See, e.g., *Hartman* v. *Federal Reserve Bank*, 55 F. Supp. 801.

§9(a) of the Act (50 U.S.C. App. §9(a)) is available only with respect to property *"held by* [the Alien Property Custodian] or by the Treasurer *of* the United States". Patents licensed to others will not be so "held".[21] Remains the remedy against respondent's Directive to transfer certain patents to respondent. Respondent maintained in the court below that petitioner could not sue to recover those patents because it "is an enemy" (Brief, 27). Hence there was no means of reviewing any aspect of respondent's Directive and the "supervisory" power is therefore void for lack of judicial remedy.

A word as to our "standing" to defend, first questioned by respondent in the court below. He urged that *had* he vested the patents, Schering *would have had* no right to recover because it "is an enemy" and hence it cannot complain of those acts now (Brief, 28). Stripped of corporate terminology, this dream of what might have been amounts to this: American purchasers from respondent are powerless to complain of his wrongful acts in contemplation of the sale, although they were designed to bind them down the years. But the law is not so poor. This is not a suit by Schering to recover patents; it is a suit by respondent for specific performance. Section 7(b) of the Act expressly authorizes an enemy to defend; see *The Pietro Campanella*, 47 F. Supp. 374, 379-380. In defending, he is entitled to the "equal protection" of our laws. *Ex Parte Kumezo Kawato*, 317 U.S. 69, 71-72. It follows that in defending against specific performance, an enemy may set up the lawlessness of official acts.

Another notion which needs to be exploded is that "disclosure" of the agreement in the prospectus of sale

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[21] Note also that §9 "deals with vested assets and not with those that are merely blocked." *Codray* v. *Brownell*, 207 F. (2d) 610, 614.

deprives the shareholders of a grievance. It is well-known that

> "the whole system of underwriting new security issues involving the use of the prospectus to safeguard, supposedly, the interests of the investor has broken down completely." [22]

The ordinary investor seldom, if ever, gets a prospectus, and could not understand it if he did.[23] Respondent would transform the SEC "disclosure" requirements, enacted as a shield for the protection of investors, into a trap for their destruction. A stockholder cannot be estopped by "disclosure" from complaining of corporate or official lawlessness. Cf. *Kahn* v. *Schiff*, 105 F. Supp. 973, 976.

CONCLUSION

In these trying days, it is lamentable that the chief law officer of the United States should cut legal corners, that he should prefer to constrain directors in violation of state law rather than to employ lawful and practical alternatives, taking refuge in federal powers which he never before exercised and which were therefore presumably withheld, as can be confirmed from the face of the statute. Needless to say, respondent's unlawful "taking" by Directive can no more be excused because he might lawfully have *vested* the patents than an unlawful search and seizure will be excused because it might have been made under search warrant. Mr. Justice Brandeis has stated that the government itself must "observe the

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[22] Quoted in Byse and Bradley, *Proposals To Amend the Registration and Prospectus Requirements of the Securities Act of 1933*, 96 U. of Pa. L. Rev. 609, 617 (1948).

[23] Lobell, *Revision of the Securities Act*, 48 Col. L. Rev. 313, 322 (1948); Douglas, *Protecting the Investor*, 23 Yale Rev. (N.S.) 521 (1934).

law scrupulously" lest the very "existence of the government • • • be imperiled." *Olmstead* v. *United States*, 277 U.S. 438, 495 (dissenting opinion). That, we submit, is the transcendent issue in this case.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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IRVING H. JUROW

April 1956.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,725

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

v.

SCHERING CORPORATION,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued December 22, 1955

Before GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 17, 1956)

PER CURIAM

This case presents questions under the Trading With the Enemy Act. The Attorney General, as successor to the Alien Property Custodian, brought an action to enjoin alleged violation of an agreement entered into between his predecessor and the defendant in January, 1952, and for a declaratory judgment that the agreement was valid. The defendant by way of counterclaim asked for recision. In the district court the plaintiff was given what he asked for and the counterclaim was dismissed. 129 F. Supp. 879 (D. N.J. 1955). No questions of fact are involved.

Judge Hartshorne examined all the questions involved

in a commendably thorough opinion which covers fifty printed pages. He upheld the action of the government officials both as to its propriety under the corporation law of New Jersey and as authorized by federal statutes dealing with trading with the enemy. We do not disagree with his discussion of the rights of the sole shareholder of a corporation under the corporation law of New Jersey. But we do not find it necessary to adopt it here because we think the problems are those of the federal government's power and the extent of its exercise with regard to the statutes involved and steps taken in pursuance thereof. The district court opinion has met each point raised. We agree with the conclusions and do not think we can strengthen them by repeating in different words the views so clearly expressed.

The judgment of the district court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

In summarizing the debates on the First War Powers Act, 1941, which amended section 5(b) of the Trading With the Enemy Act, Congressman Williams assured the House, with respect both to the prior Joint Resolution regarding "freezing" control and the 1941 amendment, that

> "there was no intention and there is no intention at all now that it should be applied to *any* transaction or any other property in which an American has an interest." 87 Cong. Rec. 9865 (1941). (emphasis supplied through out.)

Further extracts from the debates follow:

Mr. Sumners:
"• • • This is simply a section dealing with alien

enemies."

Mr. Kean:

"If it deals *only* with alien enemies I think it is perfectly all right."

Mr. Sumners:

"I believe there is no doubt about that." 87 Cong. Rec. 9859 (77th Cong., 1st Sess. Dec. 1941)

• • • •

Mr. O'Hara stated that the language

"might cause *confusion* about whether or not *it means both foreigners* and *citizens* of this country."

Mr. Hancock replied:

"I believe the gentleman will find the *limitation quite clear.* • • • *It deals with alien property.*"

Mr. O'Hara insisted, however,

"There is no question about the intention of the committee that this is to *deal only with foreign* property. That is the point to which I call the gentleman's attention."

To which Mr. Gwynne replied:

"Does not the gentleman think that the *entire bill covers nothing but aliens and alien property? There is no question about that, is there?*

Mr. Hancock commented:

"It is perfectly clear that it is intended by section 301 to *deal only with property* • • • *belonging to aliens.*" Id. at 9861.

Mr. Gwynne commented:

"• • • *It is my understanding,* as suggested by the Chairman of the Committee, [Sumners] that our *Committee had no thought other than to regulate alien property* • • •." Id. at 9862.

Mr. Springer stated:

"As I understand, the gentleman [Mr. Gwynne], has stated that subsection (b) of Section 301 *applies only to nationals of a foreign country* who have an interest in property in this country."

Mr. Gwynne:

"Yes; I think *that is clear.*" Id. at 9863.

Representatives Gwynne of Iowa and Hancock of New York were members of the Subcommittee that considered the bill. Id. at 9856.

APPENDIX C

(Copy)

FORM APC-34
TURN-OVER DIRECTIVE

Approved January, 1944

8½" x 14"—Single Sheet, printed on both sides
(Reduced Facsimile)

FORM APC-34

Revised January, 1944

OFFICE OF ALIEN PROPERTY CUSTODIAN
Washington

TURN-OVER DIRECTIVE

Re: Property of .....
(Name of foreign national)

Vesting Order No. (Fed. Reg. 19)

To: .....
(Name of Person in Possession of Property)

.....
(Address)

The undersigned, under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, and having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order and Act, or otherwise, executed and issued Vesting Order No. ..... dated .....
(a copy of which is annexed hereto and made a part hereof), and thereby vested the following described property of ....., a national of a
(Name of foreign national)
designated enemy country ( ):

Under the authority above set forth, the undersigned does hereby find and determine that the following described property, (hereinafter referred to as the said property), to wit:

now in your possession or under your control is property that was vested in the undersigned by the said vesting order.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Your attention is invited to Section 5(b) of the Trading with the Enemy Act, as amended, which provides that

> "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

The undersigned does hereby require that the said property, together with all dividends, accumulations and increment thereon, shall forthwith be by you turned over to the undersigned to be held, administered and accounted for as provided by law.

Executed at Washington, D. C. on ....., 19.....

.....

LEO T. CROWLEY
Alien Property Custodian